NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ALEJANDRO R., a Person Coming Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO R.,

Defendant and Appellant.

A144492

(Contra Costa County Super. Ct. No. J13-00823)

Alejandro R. appeals from the juvenile court's denial of his petition to reduce his attempted felony grand theft offense to a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (Cal. Const., art. II, § 10, subd. (a)) (Proposition 47). He argues the juvenile court erred in finding that his plea agreement contained an implied term that any post-disposition changes in the law, such as Proposition 47, would not apply to him. We agree and will reverse.

FACTUAL AND PROCEDURAL BACKGROUND

According to the probation report, one evening in July 2013, the victim was in front of his home in Richmond when Alejandro and another minor asked him for money. The victim told them he did not have any money and turned to go inside. Alejandro began to follow the victim; the other minor alerted the victim to look at him. The victim

turned and saw what he believed was a gun.¹ When Alejandro and the other minor approached him, Alejandro dropped the gun and said, "You wanna pay me \$20.00?" The victim was scared and hurried into his home. Alejandro hit the victim's front door. The victim yelled that he was going to call the police, to which Alejandro replied, "go ahead." Later, when the victim saw Alejandro in a nearby park, police arrested him.

In a Welfare and Institutions Code section 602 petition, the Contra Costa County District Attorney alleged that Alejandro, then 12 years old, committed attempted second degree robbery in violation of Penal Code sections 211/212.5, subd. (c),² count 1. At a pretrial conference, on the prosecutor's motion, a second count was added to the petition alleging that Alejandro committed attempted felony grand theft (§§ 487, subd. (c)/664). Alejandro admitted count 2, with a maximum time of confinement of 18 months, and count 1 was dismissed. In August 2013, Alejandro was adjudged a ward of the court and placed on supervised probation in his grandmother's home.³

In December 2014, Alejandro filed a petition for modification pursuant to Welfare and Institutions Code sections 775 and 778 seeking to reduce his felony offense to a misdemeanor based on Proposition 47. The petition stated that Alejandro admitted attempting to take money from a person in violation of sections 487, subdivision (c) and 664; his maximum term of confinement was set at 18 months; and no property was actually taken. The petition also stated, "Pursuant to Proposition 47, a violation of Penal Code section 487(c) where the Minor stole property valued at less than \$950 now carries a maximum confinement term of six months. Since the sustained charge was an attempted 487(c), then the maximum period of confinement would be three months. Petitioner requests that his offense be designated as a misdemeanor and that his

¹ The gun was a "replica firearm." ∼(CT 29)~

² All further unspecified statutory references are to the Penal Code.

³ Between the date of disposition and the ruling on the Proposition 47 petition at issue in this appeal, Alejandro admitted three probation violations, which led to commitments to the Orin Allen Youth Rehabilitation Facility (the Ranch). ~(CT 35, 46-47, 53-54, 56, 61; RT 8-9, 46-47)~

maximum term of confinement be modified to three months . . . [\P] . . . [and] that he be released from custody immediately" because he has already been detained in excess of the recalculated maximum term of confinement.

The prosecution filed an opposition disputing the applicability of Proposition 47 relief to negotiated dispositions, including this one, based on contract principles. On January 8, 2015, the juvenile court denied Alejandro's petition, reasoning that "the core aspect" of the plea bargain was "the length of time, maximum confinement time, available for the court to work the rehabilitative purposes of juvenile law." Finding the plea bargain was a contract between the parties involving the exchange of a more serious charge for a less serious charge in exchange for a plea, the court further found an "implied agreement that those particular core issues in the contract would remain . . . whether or not there were future law changes."

Alejandro filed a timely notice of appeal.

DISCUSSION

Section 1170.18, enacted by Proposition 47, provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Section[] . . . 490.2, . . . of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Section[] . . . 490.2, . . . of the Penal Code, as those sections have been amended or added by this act, unless the court in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Section 490.2, also added by Proposition 47, provides, as relevant here: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor" (§ 490.2, subd. (a).)

Proposition 47 applies to juvenile delinquency proceedings. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1224-1226; see also *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 650 (*T.W.*).)

After Alejandro filed his notice of appeal in this matter, our colleagues in Division One issued an opinion in T.W., supra, 236 Cal.App.4th at page 651, which considered whether a minor who admitted to receiving stolen property as part of a plea bargain was entitled to petition for recall of his sentence under Proposition 47. In T.W., the minor was charged with robbery and receiving stolen property after stealing the victim's purse. The minor admitted the receiving stolen property count and the robbery count was dismissed. (*Id.* at p. 649.) Subsequently, the minor filed a petition for modification pursuant to Proposition 47. (*Id.* at p. 650.) The juvenile court denied the petition on the ground that the case had been resolved by plea bargain. (*Ibid.*) In finding this was error, the appellate court reasoned: "[S]ection 1170.18 clearly and unambiguously states, 'A person currently serving a sentence for a conviction, whether by trial or plea' of eligible felonies may petition for resentencing to a misdemeanor. (*Id.* subd. (a), italics added.) The only persons categorically ineligible are those with prior convictions for an enumerated handful of serious crimes, such as murder, rape, or child molestation. (See §§ 490.2, subd. (a), 667, subd. (e)(2)(C)(iv) [listing the disqualifying prior violent convictions].) After a petitioner is found to be eligible, the trial court must grant the petition for reduction of sentence unless the court finds in its discretion that the petitioner poses an unreasonable risk of committing a very serious crime. (See § 1170.18, subds. (b), (c).) The statute does not otherwise automatically disqualify a petitioner and nothing in section 1170.18 reflects an intent to disqualify a petitioner because the conviction was

obtained by plea agreement." (*T.W.*, *supra*, at p. 652.) Alejandro argues that he is similarly situated to the minor in *T.W.*, and the same result should obtain.

In opposition, the Attorney General contends that *T.W.* only holds generally that Proposition 47 applies to plea bargains in juvenile cases, and that construing *T.W.* more broadly as establishing a legal presumption in favor of resentencing minors in Alejandro's position would conflict with the Supreme Court's decision in *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*). According to the Attorney General, *Doe* acknowledges that plea agreements may implicitly or explicitly provide that the consequences of a plea will remain fixed despite any subsequent changes in the law, and such is the case here.

In *Doe*, the Supreme Court accepted the Ninth Circuit's request to consider "'[u]nder California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?' " (*Doe*, *supra*, 57 Cal.4th at p. 66.) The defendant in *Doe* had pleaded guilty to one count in exchange for the dismissal of others and was required to register as a sex offender. At the time of the plea agreement, sex offender registration records were private. The law subsequently changed, and registered sex offenders' names, addresses and photographs became subject to public disclosure. (*Id.* at p. 66.) The change was expressly made retroactive and thus applied to Doe's conviction. (*Id.* at p. 67.) Doe brought a federal lawsuit claiming that his plea bargain contained an implied promise that the privacy protections in place at the time of his plea would remain in effect and the amended law would violate his plea agreement. (*Id.* at pp. 67-68.)

Responding to the federal court's query, the Supreme Court stated, "the rule in California is that a plea agreement's reference to a statutory consequence attending a conviction, even when coupled with prosecutorial and judicial silence on the possibility the Legislature might amend the statute, does not give rise to an implied promise that the defendant, by pleading guilty or nolo contendere, will be unaffected by a change in the law." (*Doe*, *supra*, 57 Cal.4th at p. 73.) However, and this is the portion of the opinion upon which the Attorney General herein relies, the *Doe* court also stated, "The remaining

cases cited by the Ninth Circuit address a related but not identical question: whether, despite the general rule, the facts and circumstances of a particular plea agreement might give rise to an implicit promise that the defendant will be unaffected by a change in the law. Thus, even though, as we have explained, California law does not hold that the law in effect at the time of a plea agreement binds the parties for all time, it is not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law. [Citations.] [¶] Whether such an understanding exists presents factual issues that generally require an analysis of the representations made and other circumstances specific to the individual case." (*Id.* at p. 71.)

The Attorney General argues that such an implicit understanding exists in this case, and that the record supports the juvenile court's inference that the parties implicitly expected that the disposition would remain a felony and the maximum time of confinement would remain fixed notwithstanding possible future changes in the law. The Attorney General urges that this result is consistent with the rehabilitative goal of juvenile law, which is served by plea dispositions allowing the court to maintain jurisdiction over the ward, if required, up to the maximum time of confinement.

We are not persuaded. Looking to the facts and circumstances surrounding the plea agreement in this matter, there is no indication that the parties intended that 'the consequences of [the] plea [would] remain fixed despite amendments to the relevant law." (See *Doe*, *supra*, 57 Cal.4th at p. 71.) The Attorney General cites the terms of the plea agreement itself, noting that although the amended grand theft charge *could* have been resolved as a misdemeanor or left open for a motion to reduce the offense from a felony to a misdemeanor, here the parties agreed it would be a felony. Moreover, the parties agreed to a maximum time of confinement of 18 months (based on felony attempted grand theft), which carried the implicit understanding that any reduction in time would depend on Alejandro demonstrating rehabilitation. Further, Alejandro did not move to reduce the offense to a misdemeanor at the time of disposition. However, these facts establish only that the parties reached a negotiated resolution and the defense

(understandably) did not seek to change the terms, particularly given the law in effect at the time.

The Attorney General also cites Alejandro's probation violations as support for the juvenile court's concern and "understanding" at the time of disposition in August 2013 that the matter would remain a felony and that the 18 month maximum confinement time would be reduced, if at all, only through Alejandro's demonstrated rehabilitation. The argument is without merit. Alejandro's probation violations occurred in 2014; they have no bearing on what the court understood at the initial disposition. Our review of the transcript of the plea agreement at the July 23, 2013, pretrial conference indicates nothing more than that the court received the agreement and restated the terms as described by the parties:

"THE COURT: The matter is on for pretrial. Is there a proposed resolution in this matter or are we confirming the contest date?

"[Defense counsel]: There is a proposed resolution, Your Honor. Alejandro will be pleading no contest to an amended count two Penal Code Section 487, I believe subdivision C.

"THE COURT: Grand theft of a person?

"[Defense counsel]: Slash—yes—slash 664. Attempted grand theft from a person as a felony.

"THE COURT: As a felony. Statutory maximum?

"[The prosecutor]: Is 18 months, Your Honor.

"THE COURT: "What that means Alejandro is that at the time of disposition, the Court could order that you be confined for 18 months, which is basically a year-and-a-half. That does not mean that's what I will do, but it means it's what I could do. And the law requires me to make sure you know before you enter your plea of no contest what the worst case is for you about how long you could be kept in custody based on your plea of no contest. . . ."

At the disposition hearing on August 6, 2013, the court expressed concern that the probation recommendation of 120 days of home supervision seemed low and was likely

based on Alejandro's age rather than his conduct, and warned Alejandro that a probation violation likely would result in being sent to the Ranch. However, we discern nothing that suggests the parties intended to insulate Alejandro from any subsequent changes in the law. Accordingly, Alejandro is entitled to petition for recall of his sentence under section 1170.18, and have the court consider it on the merits. (See *T.W.*, *supra*, 236 Cal.App.4th at p. 652.)

DISPOSITION

The order denying the petition to reduce Alejandro's offense to a misdemeanor is vacated. The matter is remanded to the juvenile court to hold a hearing to determine whether Alejandro poses an unreasonable risk of danger to public safety (§ 1170.18, subd. (b)) and based on that determination to grant or deny the petition.

	Miller, J.	
We concur:		
Kline, P.J.		
Stewart, J.		

A144492, People v. Alejandro R.